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Christopher Braun
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Re. STATEMENT OF COMPROMISE NEGOTIATIONS SUBJECT TO FED. R. EVID. AND IND. EVID. R. 408
Electrical Resistance Heating Contract, October 3, 2016

Messrs. Braun and Racher,

On behalf of my client McMillan McGee Corporation (herein "Mc2"), please accept this letter in response to your correspondence dated June 1, 2021.

The ET-DSP^{TM} system operated as designed, with the desired effect of heating the treatment zone, as defined in the Contract of October 3, 2016 (herein "the Contract") to a depth of forty (40) feet below ground surface (BGS). The extraction and treatment system operated at the design capacity throughout the project. Stated another way, Mc2's thermal remediation procedure worked exactly as expected, and the contaminants were reduced to more than an order of magnitude below the Contract goal.

Groundwater screening samples collected from the site extraction wells on January 30, 2019, and from P-1 and P-2 on August 2, 2019, show cleanup criteria were met on both occasions, yet subsequent groundwater sampling of these wells show magnitude concentration increase in the area of P-1 and P-2. As was pointed out to your client on several occasions, these increases indicated a likely contaminant source outside of the thermal treatment area. Mc2 also advised on multiple occasions that this outside mass, which was not part of the treatment zone,

was easily treated by simply redefining the treatment area and putting electrodes lower than the mass.

Clauses 7.1 and 7.2 of the Contract stipulate that where site conditions differ from what was distributed in the Invitation to Prequalify for the Contract, there may be an adjustment to the Contract Price. This stipulation regarding outside contamination was reiterated at clause 3.2.1(8) of Mc2's Design Proposal where Mc2 noted specifically that it would not be held responsible for any contaminants outside of the treatment zone and that any additional decontamination required due to such contaminants would require a Change Order. Mc2 advised in writing on November 12, 2019, that the outside contamination is a fundamental difference within the meaning of clause 7.2 and 7.2A of the Contract. This communication was ignored.

At the direction of the EPA, further groundwater and soil sampling was conducted in July and August 2020, which confirmed that there was, in fact, DNAPL below the treatment area, just as Mc2 had opined. The EPA reviewed this result and directed that further thermal remediation be used to remove these contaminants. Rather than comply with this direction from the EPA, however, the Trust has elected to instead serve a Notice of Default on Mc2 and proceed with bioremediation, which is ineffective for treating DNAPL.

Mc2 remains committed to cleaning the site, using the approach advocated by the EPA as the most effective method. Mc2 has offered multiple times to work with the Trust to clean up the Site but has indicated that remediation below the contract depth would require an adjustment to the Contract price. The Trust has instead chosen to proceed with bioremediation, in the face of the EPA's direction that further thermal treatment should be used.

Mc2 has also advised on multiple occasions that the remaining treatment areas were localized and did not require all of Mc2's equipment to remain on Site and, further, that there was different equipment that would be more appropriate for the remaining issues. In response, the Trust hired security to ensure that Mc2's equipment could not be removed. Notwithstanding my requests that you provide justification for such knowing and intentional unauthorized exertion of control over my client's property, you have failed to provide same. It appears that the Trust is taking all steps possible to avoid paying Mc2 what is due and owing under the Contract.

The Trust has breached the Contract by failing to properly delineate the Site in the first instance. The Trust has further frustrated the Contract by refusing to allow Mc2 to do any further work. The EPA has agreed with Mc2 that the mass exists below 40 feet, and that this requires thermal remediation. The Trust, however, has thwarted any attempts by Mc2 to address the remaining contamination, and, in fact, did not even advise Mc2 of the EPA's direction. The Trust has chosen to proceed with bioremediation in the face of the EPA's and Mc2's recommendations, yet now attempts to collect such bioremediation costs from Mc2.

Any suggestion that Mc2 has breached the Contract fails on its face. Mc2 has performed all of its obligations under the Contract. Had the Trust followed Mc2's recommendations, the Site would have been cleaned up nearly two years ago.

Mc2 remains committed to cleaning up the Site, insofar as the trust is willing to follow Mc2's recommendations. This would require an adjustment to the Contract Price and payment of Mc2's outstanding costs for the two-year delay during which it continued to pay electrical and equipment costs, which currently amount to $3,018,203.07 USD, not including any claims for damage to Mc2's equipment, which is currently unknown.

Sincerely,

Charles J. Maiers

CJM

cc: Matthew Ohl (ohl.matthew@epa.gov)
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